

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BILLIE BARR, a married person,
and BRAD BARR, a married
person,

Plaintiffs,

vs.

CITY OF ROSLYN, a Washington
municipal corporation; CITY OF
CLE ELUM, a Washington
municipal corporation; CLE
ELUM POLICE DEPARTMENT, an
agency of the CITY OF CLE
ELUM,

Defendants.

NO. CV-09-3002-JPH

**ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

1. INTRODUCTION

Plaintiffs brought this action alleging violations of the United States and Washington State Constitutions and state laws of conversion, trespass to chattels and defamation in Kittitas County Superior Court. The matter was removed to Federal Court pursuant to 28 U.S.C. 1441 and 1443 (Ct. Rec 1). The parties consented to disposition by a Magistrate Judge (Ct. Rec. 4).

Defendants deny all claims and move for summary judgment of dismissal (Ct. Rec. 14). Prior to argument, Plaintiffs agreed to withdraw all federal claims as well as the state law defamation claim. (Ct. Rec. 25)

The matter came on for oral argument on January 14, 2010. Defendants were represented by Kirk Ehlis, Esq. of Menke, Jackson, Beyer, Ehlis and Harper, LLP. Plaintiffs were represented by David Browitt, Esq.

2. SUMMARY JUDGMENT

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court. *Zweig v. Hearst Corp.*, 521 F.2d 1129 (9th Cir. 1975), overruled on other grounds, *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564 (9th Cir. 1990). Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c). The moving party bears the initial burden of establishing that there is no genuine issue of material fact. *Id.*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

After the moving party makes a properly supported motion, the responding party must present specific facts showing that contradiction is possible. *British Airways Board v. Boeing Co.*, 585 F.2d 946, 950-52 (9th Cir. 1978). It is not enough for the responding party to point to the mere allegations or denials contained in the pleadings. Instead, a party must set forth, by affidavit or other admissible evidence, specific facts demonstrating the existence of an actual issue for trial. The evidence must be more than a mere "scintilla"; the responding party must show that the trier of fact could reasonably find in its favor. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 252 (1986). Accordingly, summary judgment should be granted "[i]f the evidence is merely colorable . . . or is not significantly probative." *Eisenbergh v. Insurance Co. of North America*, 815 F.2d 1285, 1288 (9th Cir. 1987).

1 A disputed version of the facts alone is not enough to
2 warrant denial of summary judgment. Gooden v. Howard County, Md.,
3 954 F.2d 960, 965 (4th Cir. 1992). Mere disagreement, or the bald
4 assertion that a genuine issue of material fact exists, no longer
5 precludes the use of summary judgment. Gamboa v. King County, 562
6 F. Supp. 2d 1288, 1295 (W.D. Wash. 2008), citing California
7 Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc., 818
8 F.2d 1466, 1468 (9th Cir. 1987).

9 10 3. FACTS

11
12 The facts relied upon are either undisputed or taken in a
13 light most favorable to the non-moving party for purposes of
14 summary judgment. (Ct. Rec. 16 and 24).

15 The plaintiffs, Billie Barr and Brad Barr, are life long
16 hunters. They have hunted in the upper Kittitas County area of
17 Washington for decades. They have extensively hunted the areas
18 adjacent to the communities of Roslyn and Cle Elum, Washington.

19 In 2006, Plaintiffs were each drawn for a special branch
20 antler elk hunt to take place in December of 2006.

21 On December 23, 2006 Plaintiffs began their hunt as that was
22 the opening day of the special hunt. Both Plaintiffs shot and
23 killed elk on that day. However, the area where Billie Barr and
24 Brad Barr discharged their high powered rifles and shot and killed
25 the elk was within the City limits of the City of Roslyn.

26 The discharge of firearms within the City limits of Roslyn is
27 prohibited by Roslyn City Code 7.40.060 and RCW 9.41.230.

1 Both Plaintiffs acknowledge that they were within Roslyn City
2 limits and both admitted that they would not have hunted in this
3 area had they known it was within the City limits.

4 Plaintiffs were cited by Officer Fletcher of the Cle Elum-
5 Roslyn police for discharging firearms inside the City limits of
6 Roslyn in violation of Roslyn City Code and state law and in
7 addition were cited for reckless endangerment in violation of RCW
8 9A.36.050.

9 A representative of the Washington State Department of Fish
10 and Wildlife was called to the scene of the shootings, verified
11 that the animals had been tagged and indicated that no state fish
12 and wildlife laws had been violated. Plaintiffs were not cited
13 with any game violations.

14 Plaintiffs were advised by Officer Fletcher that their
15 firearms and the two downed elk were being confiscated. He made it
16 clear to the Plaintiffs that the rifles were being confiscated as
17 evidence. There is a dispute of fact as to whether he told the
18 Plaintiffs that the elk were being confiscated "as evidence". The
19 police report prepared by Officer Fletcher on 12/24/2006 says the
20 elk and the heads of the elk were taken as evidence. (Ct. Rec. 18,
21 Ex. 1) The elk carcasses were transported to Owens' Meats in Cle
22 Elum. Most of the elk meat spoiled before it could be butchered
23 and wrapped. The elk heads and antlers were taken away from Owens'
24 Meats by the Cle Elum police chief over a month after the
25 shooting.

26 After being cited, both Plaintiffs were prosecuted by
27 Kittitas County. On March 7, 2007, both Plaintiffs entered into
28 stipulations for orders for stay of proceedings with the Kittitas

1 County Prosecutor's office with regard to the charge of discharge
2 of firearms within the city limits. (Ct. Rec. 21, Ex. E and F).
3 The charge of reckless endangerment was dismissed by the
4 prosecutor as part of the plea arrangement. Both Plaintiffs were
5 represented by counsel at the time they entered into the
6 Stipulations and they read, understood and agreed to the terms of
7 the Stipulations.

8 On May 24, 2007 the Kittitas County Upper District Court
9 entered Orders of Disposition of Property in both Plaintiffs'
10 cases. Pursuant to the Stipulations for and Order for Stay of
11 Proceedings which were incorporated into the Orders of Disposition
12 of Property by reference, the Court released the hunting rifles to
13 both Plaintiffs, but released to the Cle Elum Police Department
14 the antlers of the elk for disposal as the Department saw fit.
15 (Ct. Rec. 21, Ex. G and H)

16 Both Plaintiffs fulfilled the conditions of the Stipulations
17 and the charge of discharging a firearm within City limits was
18 ultimately dismissed.

19 4. DISCUSSION

20 A. Conversion and Trespass to Chattels

21 The elements of civil trespass include: (1) an act that
22 interferes with a person's right of possession in the property; (2)
23 intent to perform the act bringing about the interference; (3)
24 causation; and (4) damages. Restatement (Second) of Torts §§ 216 -
25 222 (1965).

26 Similarly, conversion is the act of willfully interfering with
27 any personal property without lawful justification, which causes the
28

1 person entitled to possession to be deprived of that possession.
2 Myers Way Dev. Ltd. Partnership v. University Sav. Bank, 80 Wn.
3 App. 655, 674-75 (1976), review denied 130 Wn. 2d 1015 (1976).
4 Stated differently, "conversion is an intentional exercise of
5 dominion or control over a chattel which so seriously interferes
6 with the right of another to control it that the actor may justly be
7 required to pay the other the full value of the chattel."
8 Restatement (Second) of Torts § 222A (1965). The plaintiff has the
9 burden of establishing ownership and some kind of property interest
10 in the goods allegedly converted. Myers Way Dev., 80 Wn.App. at 675.

11 Here, the Defendants argue that the Plaintiffs can have no
12 ownership or possessory rights in the killed elk because the elk
13 were taken as a result of an illegal act, i.e. the discharge of
14 firearms within the City of Roslyn. Defendants assert that the fact
15 that Plaintiffs committed an illegal act has been established in the
16 Kittitas County District Court and Plaintiffs are collaterally
17 estopped from challenging that determination. See Exs. "E", "F",
18 "G", and "H" to Ct. Rec. 21.

19 The State appellate courts have routinely opined that the State
20 maintains sovereign ownership over wild animals and game found
21 within the State. See State v. Moses, 79 Wn.2d 104,113 (1971). The
22 legislature has thus declared what was already the law when it
23 enacted the Fish and Wildlife Code, RCW 77.04 et seq., which states,
24 in pertinent part, at RCW 77.04.012: "Wildlife...are the property of
25 the state." Thus, up to the moment of any lawful hunt and kill, the
26 State is the sovereign owner of the elk in trust for the common good
27 of the citizens of the state.

1 Conversely, the Plaintiffs argue that since it was not against
2 the law to hunt in the city limits of Roslyn and since Plaintiffs
3 had all the required permits and licenses, they acquired a
4 possessory or ownership interest in the elk. Plaintiffs stress that
5 no game law violations were brought against them. Plaintiffs argue
6 that there is a genuine issue of material fact about whether the elk
7 were confiscated "as evidence" and that they should be given an
8 opportunity before the jury to convince the trier of fact that they
9 had a superior claim of ownership and possession.

10 Elk as Evidence

11 First of all, there is a dispute about whether the elk were
12 confiscated as evidence. Plaintiff submits that the elk were not
13 handled as evidence should be and that there are problems with the
14 chain of custody. They have put in their declarations that they were
15 never told by Officer Fletcher that he was seizing the elk as
16 evidence. And, quite frankly, Officer Fletcher may have decided to
17 confiscate the elk because he was afraid for the Plaintiffs' safety
18 from the large angry crowd that gathered after the shootings and/or
19 because he did not want to "reward" the Plaintiffs with the trophy
20 elk after they were shot following commission of the crime.

21 Defendants submit that the elk were taken as evidence as
22 reflected in the police reports, in Officer Fletcher's declaration
23 and in the acknowledgments made by the Plaintiffs during the
24 criminal proceedings in Kittitas County.

25 But the dispute of fact is not material to a determination
26 here. Whether or not the elk were confiscated as evidence or for any
27 other reason begs the real question which is whether the Plaintiffs
28 could acquire a possessory or ownership interest in the dead animals

1 when they clearly and admittedly killed the elk as a direct
2 consequence of violating the law by discharging their rifles within
3 the city limits.

4 The Court finds that they could not and did not acquire such
5 possessory or ownership interest. A disputed fact is "material" only
6 if it would affect the outcome of the suit. *Anderson v. Liberty*
7 *Lobby, supra*, at 248.

8 The elk remained the property of the state because the
9 Plaintiffs took them by illegal means. *State v. Cramer*, 167 Wn.
10 159, 164 (1932). *Cramer, supra*, involved trapping fish out of
11 season. The fishermen argued, much like Plaintiffs here, that
12 because the statute which they pleaded guilty to violating did not
13 provide for forfeiture of the fish that there should have been no
14 forfeiture. The State Supreme Court disagreed and held:

15 "The fish were the property of the [State]
16 until such time as they were lawfully reduced
17 to possession, and never having been lawfully
18 reduced to possession, they continued to be the
property of the state, and should have been
returned to the state."

19 When parties opposing summary judgment controvert only facts
20 that are not material to the summary judgment motion, the
21 defendants' motion for summary judgment should be granted. *Rozek v.*
22 *Topolnicki*, 865 F.2d 1154, 1156-58 (10th Cir. 1989).

23 Judicial Estoppel

24 The doctrine of judicial estoppel is intended to protect the
25 integrity of the judicial system. *Burnes v. Pemco Aeroplex, Inc.*,
26 291 F.3d 1282, 1285 (11th Cir. 2002). Or, as more fully explained by
27 the Ninth Circuit:
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1
2 The doctrine of judicial estoppel, sometimes referred to as the
3 doctrine of preclusion of inconsistent positions, is invoked to
4 prevent a party from changing its position over the course of
5 judicial proceedings when such positional changes have an
6 adverse impact on the judicial process. 'The policies
7 underlying preclusion of inconsistent positions are "general
8 consideration(s) of the orderly administration of justice and
9 regard for the dignity of judicial proceedings.'" Judicial
10 estoppel is 'intended to protect against a litigant playing
11 "fast and loose with the courts.'" Because it is intended to
12 protect the integrity of the judicial process, it is an
13 equitable doctrine invoked by a court at its discretion . . .
14 Judicial estoppel is most commonly applied to bar a party from
15 making a factual assertion in a legal proceeding which directly
16 contradicts an earlier assertion in the same proceeding or a
17 prior one.

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19 Russell v. Rolfs, 893 F. 2d 1033, 1037 (9th Cir. 1990).

20
21 Plaintiffs' argument is that although they agreed not to
22 challenge the police reports and that the information contained in
23 those reports was sufficient to establish their guilt, they never
24 waived or gave up their right to be compensated for the loss of
25 the elk they shot. At oral argument, Plaintiffs contended that, in
26 fact, since the charge was ultimately dismissed, they were never
27 convicted of any crime and cannot be estopped judicially from now
28 claiming compensation for the lost elk.

1 Both arguments ring hollow when viewed against the documents
2 they signed. In the criminal proceeding, the Plaintiffs both
3 agreed in the Stipulation For and Order Staying Proceedings
4 (Stipulation) that they would not challenge the police reports and
5 that the information contained in those reports was sufficient to
6 establish their guilt. Ct. Rec. 21, Ex. E and F.

7 Significantly, the Plaintiffs and the State agreed in the
8 Stipulation that only the rifles used in the shooting would be
9 returned to the Plaintiffs and that the "antlers that were taken
10 as evidence" would not be returned to the Plaintiffs. See page two
11 of three of the Stipulation. That this provision was clearly
12 called to the Plaintiffs' attention cannot be disputed because
13 originally it had been contemplated that the antlers would be
14 returned to Plaintiffs but that language was crossed out and
15 initialed by the Plaintiffs.

16 Further, the police reports that Plaintiffs stipulate were
17 accurate provide conclusive evidence that Plaintiffs discharged
18 their weapons within the city limits and thereby violated a city
19 ordinance and state law. Plaintiffs cannot now, in the face of
20 those stipulations, be heard to say that they were never convicted
21 of any crime for purposes of avoiding summary judgment here.

22 Finally, the Stipulation allows the court to enter orders
23 consistent with the tenor of the Stipulation and the Plaintiffs
24 agreed to be bound thereby. See page three of three of
25 Stipulation. Within three (3) months time, the court entered an
26 Order of Disposition of Property, which incorporates the
27 Stipulation by reference and unambiguously recites the Plaintiffs'
28 previous agreement to relinquish any right they may have had to

1 the elk antlers. Ct. Rec. 21, Exs. G and H. The Order released the
2 antlers (the only remains of the elk by this time) to the "Cle
3 Elum Police Department for disposal as they see fit."

4 There is no recognition of any property right in the elk in
5 the Plaintiffs in either the Stipulation or the Order. The Court
6 finds the Plaintiffs claims are barred by judicial estoppel.

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8 **B. Article 1, § 3 of Washington State Constitution**

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10 Article 1, § 3 of the Washington State Constitution provides:
11 "No person shall be deprived of life, liberty or property without
12 due process of law."

13 It is incumbent on the Plaintiffs to show, through sworn
14 testimony and admissible evidence, that their constitutional
15 rights were violated. Plaintiffs have provided neither. As
16 indicated, supra, the Plaintiffs never obtained any possessory
17 interest in the elk they illegally killed. Further, after
18 consultation with their criminal attorney, they stipulated that
19 they would forfeit any right they had to the remains of the elk in
20 order to avoid further prosecution. The record is devoid of any
21 attempt or effort made by the Plaintiffs at any time from the date
22 the criminal charge was made against them, through the date of
23 dismissal of the criminal charge, to assert ownership of the elk.

24 Plaintiffs cite no case law that supports their claim that
25 they were not afforded due process of law. The Washington State
26 Supreme Court has established that substantive and procedural due
27 process protections provided by Article I, § 3 are not broader
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1 than those provided by parallel federal constitutional provisions.
2 State v. Burton, 92 Wn.App. 114, 117-18 (1998).

3 It is a longstanding requirement that a party invoking the
4 potentially greater protection of the Washington State
5 Constitution must address the Gunwall factors (State v. Gunwall,
6 106 Wn.2d 54, 61-62) Rafn Company v. State of Washington Dept. of
7 Labor and Industries, 104 Wn.App. 947, 951 (2001). Here,
8 Plaintiffs do not do so and have withdrawn all federal claims from
9 consideration by the Court. The Court is justified in declining to
10 consider the asserted claims under those circumstances. Rafn
11 Company v. State at pp. 713.

12 Plaintiffs' claims under Art. 1, § 3 of the Washington State
13 Constitution should be, and are, dismissed.

14
15 **C. Article 1, S. 7 of Washington State Constitution**
16

17 Article 1, § 7 of the Washington State Constitution provides:
18 "[n]o person shall be disturbed in his private affairs, or his
19 home invaded, without authority of law". To demonstrate a
20 violation of this section requires a two-step analysis; was there
21 a disturbance of one's private affairs and, if so, was the
22 disturbance authorized by law. State v. Athan, 160 Wn. 2d 354,
23 365-6 (2007), citing In re Personal Restraint of Maxfield, 133 Wn.
24 2d 332, 339 (1997).

25 Plaintiffs assert that their hunting activity on the day the
26 elk were shot is a private matter and that the police should not
27 have interfered with that "private" right. Plaintiffs do not cite
28 any case law in support of that proposition.

1 The term "private affairs" generally means "those privacy
2 interests which citizens of this state have held, and should be
3 entitled to hold, safe from government trespass." Athan, 160 Wn.2d
4 at 366, quoting State v. Myrick, 102 Wn.2d 506, 511 (1984). In
5 making the determination the Court looks at the historical
6 treatment of the interest being asserted, analogous case law, and
7 statutes and laws supporting the interest asserted. Voluntary
8 exposure to the public is relevant to [the Court's] inquiry and
9 can negate an asserted privacy interest. Athan, 160 Wn.2d at 366.

10 It strikes this Court that far from being a "private affair",
11 hunting is a highly public affair, especially considering the
12 circumstances known here. The plaintiffs obtained both a hunting
13 license and a special permit from public, state agencies prior to
14 commencing the hunt. The plaintiffs were subject to a public
15 hunting season and to rules and regulations governing such hunts.
16 Further, this hunt actually took place in a public zone (the
17 Roslyn city limits) and was openly observed by numerous citizens,
18 many of whom felt threatened by the discharge of the plaintiffs'
19 weapons. The elk kills were subject to inspection by an officer of
20 the state Fish and Wildlife department. The plaintiffs clearly
21 knew that their activities were going to be occurring in a public
22 place, even if they had not been within the city limits, because
23 this was not a hunt conducted on a private game reservation.

24 The Court finds that all of these factors negate the
25 Plaintiffs' contention that this was a private affair and the
26 Court does not find that Article 1, § 7 affords the Plaintiffs any
27 enhanced protection in the context of this case. State v.
28 McKinney, 148 Wn. 2d 20 at 26-27 (2002).

1 Plaintiffs' claims under Art. 1, § 7 of the Washington State
2 Constitution are dismissed.

3
4 **D. Failure to Properly File Administrative Claim under RCW**
5 **4.96.020**
6

7 Having disposed of the Plaintiffs' claims on their merits, it
8 is unnecessary to reach the procedural claim raised by the
9 Defendants.

10 **5. ORDER**
11

12 The Defendants' Motion for Summary Judgment (Ct. Rec. 14) is
13 GRANTED and Plaintiffs' claims are DISMISSED WITH PREJUDICE as a
14 matter of law.

15 The Defendants are entitled to entry of a Judgment of
16 Dismissal and taxation of costs pursuant to LR 54.1.

17 DATED this 25th day of January, 2010.
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19 s/ James P. Hutton
20 JAMES P. HUTTON
UNITED STATES MAGISTRATE JUDGE
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